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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1310

STA-RITE INDUSTRIES, INC., a corporation,
Petitioner,

VERSUS

HOMER JOHNSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1972

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Respondent opposes the petition for writ of certiorari in the above cause because there are no special or important reasons therefor under Rule 19 of this Court, or otherwise.

STATEMENT

The outline of the factual situation as set forth in petition for a writ of certiorari is substantially correct. The above cause was tried on September 5, 1969, and September 23, 1969, to District Judge Fred Daugherty of the Western District of Oklahoma with a jury being waived by all parties. Briefs were submitted and the opinion dated December 19, 1969, was issued by the court after the submis-

sion of extensive briefs and obviously after very careful consideration by that court. Thereafter, plaintiff's Motion to Open the Proceedings, Take Additional Testimony and Amend Its Opinion and Enter Judgment for the Plaintiff was filed in December, 1969, and after briefs were filed again, the motion of petitioner was denied on March 26, 1970, in accordance with the order appearing at Appendix C.

ARGUMENT AND AUTHORITIES

Petition for Writ of Certiorari states that the questions presented are as follows:

1. It is the duty of either the Federal District Court as well as the Court of Appeals to ascertain, apply and follow the state law where it is the substantive rule of decision.

2. It is the duty of either the Federal District Court or the Court of Appeals to ascertain and apply the state law where it is the substantive rule of decision even though it has not been expounded by the highest state court and is expounded subsequent to the earlier opinion of the Federal Court prior to judgment.

The petition is then apparently based on the contention that both the United States District Court of Oklahoma and the Tenth Circuit Court of Appeals in the above cause have failed to follow the law of the State of Oklahoma.

No Conflict Between Oklahoma Law and the Opinions and Decisions of the Federal District Court and Circuit Court of Appeals

There is no conflict in the opinions and decisions of the Federal District Court and Circuit Court of Appeals and the Oklahoma law. In its opinion filed December 19, 1969, the Federal District Court carefully and logically followed appropriate Oklahoma statutory rules for determining existence of a partnership or the existence of a partnership by estoppel and cited and followed pertinent decisions of the Oklahoma Supreme Court and concluded that the evidence, as a matter of fact, did not fulfill petitioner's burden of proof. The Circuit Court of Appeals found that the decision of the trial court was in accordance with the evidence, citing and following applicable decisions of the Oklahoma Supreme Court.

Petitioner contends that the determination by a jury in another and separate action that respondent was responsible to another creditor for an obligation of Central Pump and Supply (the alleged partnership) under different evidence (which verdict was dated October 8, 1969—several weeks after the trial of the case at bar) is conclusive as to this case. Petitioner attaches as Appendix D to its Petition an opinion of one of the Oklahoma Courts of Appeals (intermediate appellate court) which opinion states on its face:

> "This opinion not to be considered as precedent or authority and not for publication in the official reporter."

The Order of the trial court (Appendix C) precisely and effectively disposes of this contention by stating:

> "It would be no more appropriate for this Court to change its findings and conclusions herein because of said jury determination than it would be for that determination to be changed because of this Court's decision. We are both triers of the facts presented to us and it would not be proper for this Court to reopen the case to consider the result reached by a jury in another case under the evidence presented therein."

There is nothing in the Oklahoma Court of Appeals decision contrary in any respect to the legal principles relied upon by the Federal District Court and Circuit Court of Appeals in the case at bar. It is also obvious that the Oklahoma intermediate appellate court would have affirmed the judgment of the federal district court in the case at bar because there was sufficient evidence to support said judgment. Incidentally, the Oklahoma Court of Appeals decision is not final and is now pending upon petition for writ of certiorari to the Oklahoma Supreme Court. It is our view, however, that it would make no difference whether or not the decision was final.

Petitioner contends that the Circuit Court of Appeals overlooked the rule in Oklahoma that where the parties associate themselves together for the purpose of organizing a corporation, and fail to do so, they thereupon become partners to the extent of their interest even though there was a specific finding in the trial court that respondent associated himself with the alleged partner Bunch for the purpose of forming a corporation. Petitioner relies on *Mapel* ("Maple" in the Petition) v. *Long-Bell Lumber Co.*, 103 Okla. 249, 229 Pac. 793. That case, decided more than thirty years prior to Oklahoma's adoption of the Uniform Partnership Act, states:

> Headnote 3: "When the fact appears that parties associated themselves together and incurred liabilities in the conduct of a business under a certain name, the legal presumption is that they are governed by the general rule and are liable as partners, and the burden is on them to prove that they are duly incorporated or that they fall under some exception to the general rule."

In that case, none of the alleged partners testified and the trier of the facts found there was an association of the parties and the incurring of liabilities by them. The only mention of incorporation in the trial court's memorandum opinion in the case at bar is that an agreement was made between respondent and Bunch to incorporate on October 27, 1967, and that the business was incorporated on November 11, 1967. The account sued upon in the case at bar covers items acquired prior to the incorporation and the agreement to incorporate. The trial court found that there was no association of respondent and Bunch and no incurring of liabilities to petitioner by respondent. There is no conflict in the judgments and decisions in this case with the decision or opinion in the *Mapel* case.

Petitioner also contends the Circuit Court of Appeals decision in the case at bar is contrary to the same Court's 1962 decision in *Clay* v. *Sun River Mining Company*, 302 F.2d 599. In that case the Court held:

> Headnote 4: "Court in diversity action involving Oklahoma judgment, must consider subsequent judgment by Oklahoma District Court, determining that *judgment in issue* was void on its face." (Emphasis is ours.)

In the *Clay* case, plaintiff, on March 2, 1959, filed an action to quiet title to personal property which it had

acquired from defendant's former wife. On September 5, 1958, a default judgment had been rendered in the District Court of LeFlore County, Oklahoma, in favor of the wife against the defendant in a separate maintenance action, which judgment determined that she was the sole owner of the personal property in question and which judgment was the basis of plaintiff's claim of ownership in the quiet title action. On December 19, 1958, the District Court of LeFlore County, Oklahoma, set aside its September 5, 1958, judgment finding that it was void upon its face as shown by the judgment roll, that it was obtained by fraud, and that the determination of such ownership could not be made in a separate maintenance action. The difference between the *Clay* case and this case is obvious. The judgment relied upon by plaintiff in the *Clay* case had been vacated by the court which rendered it *prior* to the filing of the *Clay* case and the decision of the court in vacating its own judgment would obviously be binding upon the federal court.

This Court Accepts Determination of Local Law by Circuit Court of Appeals Unless Clearly Unreasonable

It is the policy of this Court to accept determination of local law as made by the Circuit Court of Appeals and federal district courts unless such determinations are clearly unreasonable.

United States v. *Durham Lumber Company*, 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371 (1960):

> Headnote 2: "In dealing with issues of state law that enter into judgments in federal courts, the Su-

preme Court is hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."

Commissioner of Internal Revenue v. *Estate of Vosch*, 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886 (1967):

Headnote 5: "Supreme Court ordinarily accepts determination of local law by Court of Appeals."

Headnote 6: "Supreme Court would affirm without discussion holding of Court of Appeals that would clearly negate application of state proration statute, an issue which was solely one of state law."

Inasmuch as the only contention made by petitioner rests solely on a determination of local law, the petition for writ of certiorari should be denied.

This Court Accepts Determination of Facts by Lower Court Unless Obviously Erroneous

It has also been the policy of this Court to accept determination of facts as made by the lower court unless obviously erroneous.

Berenyi v. *District Director, Imm. & Nat. Serv.*, 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed.2d 656 (1967):

Headnote 1: "Supreme Court cannot undertake to review concurrent findings of fact by two courts below in absence of very obvious and exceptional showing of error."

Headnote 2: "Supreme Court possesses no empirical expertise to set against careful and reasonable conclusions of lower courts on purely factual issues and if resolution of disputed factual issues turns largely on an assessment of relative credibility of witnesses

whose testimonial demeanor was observed only by trial court, the 'two-court rule', whereby Supreme Court cannot undertake to review concurrent findings of fact by two courts below in absence of very obvious and exceptional showing of error, has particular force."

Appalachian Power Co. v. *American Institute of C.P.A.*, 80 S.Ct. 16, 361 U.S. 82, 4 L.Ed.2d 30 (1959):

Headnote 1: "The Supreme Court on certiorari ordinarily accepts determination of state law as found by Court of Appeals in diversity action, particularly when the same finding is made by federal District Court."

Headnote 2: "Ordinarily, application by federal District Court of Rules of Civil Procedure, when affirmed by Court of Appeals, will not be reviewed by Supreme Court on certiorari, particularly where question is one that concerns judgment of District Judge in relation to a particular set of facts."

The petition for writ of certiorari is based on a quarrel with determination of facts of both federal district court and Circuit Court of Appeals and said petition should be denied.

CONCLUSION

We therefore respectfully and earnestly urge the Court to deny the petition for a writ of certiorari in the above entitled cause.

Respectfully submitted,

DENVER W. MEACHAM
Post Office Box 681
Clinton, Oklahoma 73601
Counsel for Respondent

May, 1972

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

Norman E. Reynolds, of
Reynolds and Ridings
Attorneys at Law
2808 First National Center
Oklahoma City, Oklahoma 73102,

counsel for petitioner, the only party required to be served, by mailing such true and correct copies, postage prepaid, this 5th day of May, 1972.

Denver W. Meacham